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COMMENT.

"VOLENTI NON FIT INJURIA."

In case of a violation of a specific statutory duty by an employer, resulting in an injury to an employee, is the latter deprived of his remedy for private injury by his knowledge and appreciation of the risk? If the master intentionally disregards the statute, does his servant being fully aware of the violation of law and appreciating the resulting condition and dangers, continue in the employment at his own risk or at the risk of his employer?

The authorities are in sharp conflict on this proposition. On one hand are arrayed the courts of Massachusetts, New York and Iowa; on the other the English courts and those of Illinois, Missouri, Ohio and Indiana, as well as the United States Circuit Court of Appeals.

(See *Am. & Eng. Enc. Law* 121 (2nd ed.). 47 L. R. A. 190, note.)

The first of these two opposing theories insists that the distinction is not to be drawn between employment under conditions con-

demned as dangerous at the common law and those prohibited by statute; that in the absence of an assumption of the risk an omission of duty implied by law is precisely as effective in fixing liability as though enjoined by statute; that the statute does not deprive individuals of the free agency and right to manage their own affairs and establish such of their respective rights and duties as they may choose; that "there is no rule of public policy which prevents an employee from deciding whether in view of increased wages, the difficulties of employment, or other sufficient reasons it may not be wise and prudent to accept employment subject to the rule of obvious risks"; and that the maxim *"Volenti non fit injuria,"* in such cases will apply notwithstanding the master's violation of statutory requirements.

The second line of cases which, adopting the theory and reasoning of the English courts, maintain that there ought to be no encouragement given to the making of an agreement between two persons that one of them shall be at liberty to break the law which has been passed for the protection of the other, hold that such an agreement would be in violation of sound public policy and ought not to be listened to; that it must be assumed "that the manifest legislative purpose was to protect the servant by positive law because he had not shown himself capable of protecting himself by contract, and that it would enirely defeat this purpose to permit the servant to contract the master out of the statute"; and that the master may not be allowed to set up a defense that he has violated no legal duty because the servant by express or implied contract lifted off his shoulders that which the statute had laid upon them.

The leading decision affirming the application of the maxim in such cases is that of *O'Maley v. Gaslight Co.*, 158 Mass. 135. In New York the doctrine laid down by the Massachusetts court was adopted in *Knisley v. Pratt*, 148 N. Y. 372. It has been emphatically reaffirmed in Iowa in *Martin v. Chicago, R. I. & P. R. R. Co.*, 91 N. W. 1034 (Oct. 1902) wherein the Court say, "It would be quite as obnoxious to public policy, independent of the penalty imposed, for an employee to aid and encourage the employer in his disregard of ordinances, as for the employer to violate it. . . In the matter of assumption of risks, it is immaterial whether they arise from violation of common law duty or an obligation imposed by statute." The Court also criticize the opinion of Judge Taft in *Narramore v. Railroad Co.*, 37 C. C. A. 499.

Taking the other view is another recent case, in Indiana, *Monteith v. Kokomo Wood Enameling Co.*, 64 N. E 610 (Sup. Ct. Ind. 1902), which was an action for injuries from saw-mill machinery operated in an unguarded manner in violation of statute. It was there held that the maxim *"Volenti non fit injuria"* is not applicable in cases where injury arises from the breach of statutory duty, and the workman was allowed to recover.

It thus appears that the rule of the English cases and the Massachusetts doctrine are too completely contrary to be reconcilable other than by specific statutory enactments with such an end in view.

It will be interesting, however, to watch the spread of the two opposing opinions to other states.

FOREIGN CORPORATIONS—RIGHT OF ACTION AFTER FAILURE TO COMPLY WITH STATE REGISTRY LAW.

The courts of the various States have long been in conflict as to the right of a foreign corporation to sue on a contract when it has failed to comply with the requirements of the State in regard to acquiring the right of doing business in the State.

In a recent case in Pennsylvania—*Delaware River Quarry & Construction Co. v. Bethlehem & Nazareth Passenger Railway Co. et al.,* 53 Atl. 533—this subject is again brought to our notice.

In this case a New Jersey corporation had constructed a railroad for a Pensylvania company without having registered in Pennsylvania, which was required as a condition precedent to the right of doing busines in that State. It was *held* that the company could not sue on a *quantum meruit* to recover for labor and materials and that any contract, express or implied, made by this company, within the State, was absolutely void. The reasoning of the court is to the effect that this is a contract made in violation of the provisions of the constitution and laws of the State, and, therefore, it is against public policy to enforce it. *Parish v. Wheeler,* 22 N. Y. 494; *Whitmore v. Montgomery,* 165 Pa. 253.

In direct conflict with this doctrine is that upheld in Tennessee and Alabama—*Trust Co. v. Willhoit,* 84 Fed. 514; *Sherwood v. Alvis,* 83 Ala. 115—which follows the same reasoning as that laid down in the Supreme Court of the United States, *Fritts v. Palmer,* 132 U. S. 282, where the leading cases on the subject are cited. Here it is held that a contract of this nature is not against public policy, is not invalid as between the parties and can only be interfered with at the instance of the State. This holding is in exact accord with the doctrine in regard to the restriction on the holding of real estate by national banks. *Gold Mining Co. v. National Bank,* 96 U. S. 640.

Another line of cases, following a decision in New York—*Crefield Mills v. Goddard,* 69 Fed. 141—hold that a State law of this kind is merely a State regulation, and that its only effect is to suspend the right to sue until the requirements are complied with. *Sullivan v. Beck,* 79 Fed. 200; *Gas Pipe Co. v. Connell,* 33 N. Y. Supp. 482.

The practical result of the holding in New York seems to vary but slightly from the result of that in Tennessee. Both States make it possible for a corporation to disobey the law and still, by a subsequent compliance, lose nothing by such action; while that in Pennsylvania goes to the other extreme and by declaring all such contracts absolutely void, bars the plaintiff from the protection of the rule that estops the defendant from claiming immunity after having received some benefit, and of that principle which fixes a